IN THE

Supreme Court of the United States

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October Term ~~1951~~ 1952

No. [redacted] MISC.

[redacted] 392
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HARRY A. STEIN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK WITH BRIEF IN SUPPORT THEREOF

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Petition for Writ of Certiorari to the Court of Appeals of the State of New York

To the Honorable Fred M. Vinson, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Harry A. Stein, respectfully represents the following:

Summary Statement of Matter Involved

Your petitioner, together with Calman Cooper and Nathan Wissner, whose petitions for writs of certiorari to the Court of Appeals of the State of New York are being presented separately, was, on December 21, 1950, convicted of the crime of murder in the first degree, after trial before a jury in the County Court, Westchester

County, New York State, and on December 27, 1950 petitioner was sentenced to be executed, as were the said Calman Cooper and Nathan Wissner* (Rec., 2801-2)**.

Upon appeal to the Court of Appeals of the State of New York, the judgment of conviction, as to all three, was, on March 6, 1952, unanimously affirmed, without opinion.

The petitioner is under sentence of death.

A written confession of petitioner was admitted in evidence (Rec., 1969-1981; 2897-2903, Respondent's Exhibit 64), as were certain prior and subsequent oral statements (Rec., 240-1; 1700; 1909; 1991; 2160-4; 2238), over objection and exception by petitioner, and objection was specifically made that the admission of said written confession and oral statements was a denial of "due process" under the Fourteenth Amendment of the Constitution of the United States***.

The remittitur of the Court of Appeals of the State of New York, as amended by order dated April 18, 1952, recites, *inter alia,* that:

> "Questions under the Federal Constitution were presented and necessarily passed upon by this Court, viz: * * * (2) whether the admission in evidence of the confession and the prior and subsequent oral statements of the defendant Stein violated his rights under the Fourteenth Amendment of the Constitution of the United States; * * * This Court held that the rights of the defendants under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied."

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* A stay of execution, as to all three petitioners, was granted by Order of Mr. Justice JACKSON, dated April 7, 1952.

** References are to pages of Record on Appeal in the Court of Appeals of the State of New York.

*** For all such objections, see Rec., 160; 228-30; 1582-3; 1700; 1705; 1707-8; 1900; 1966-7; 1989-90; 1992; 1994; 2128; 2139-40; 2154; 2238; 2243.

The question here presented is whether the admission in evidence of "the confession and the prior and subsequent oral statements" of this petitioner, who seasonably and at every stage of the trial objected to their introduction, was a denial of due process under the Fourteenth Amendment of the Constitution of the United States.

Details of Crime

On April 3, 1950, at about 3 P.M., at which time it was raining (Rec., 211), four robbers held up a truck owned by the Reader's Digest Association on the private roadway leading from the Reader's Digest plant at Chappaqua, New York, at a point near its intersection with Route 117 (Bedford Road). The truck was being operated by William Waterbury, who was accompanied by a messenger, Andrew Petrini (Rec., 214). A single shot, fired by one of the robbers (Rec., 215), passed from the outside through the window glass of the right hand door of the truck, penetrated Petrini's head, and caused his death a few hours later (Rec., 167; 171-2).

The Testimony

The testimony affecting petitioner was given by one Dorfman, held to be an accomplice as a matter of law (Rec., 2728), whose testimony was not corroborated as required by Section 399 of the Code of Criminal Procedure of New York State*; by Regina Dorfman, the wife of the accomplice, and Michael Homishak, witnesses called for the purpose of corroborating the accomplice, but whose testimony showed, at most, association of petitioner with the accomplice, which, under the decisions of New York State, is insufficient to establish corroboration (*People* v.

* Vide Appendix E.

O'Farrell, 175 N. Y. 323, 325; *People* v. *Kress*, 284 N. Y. 452, 459); and by the witness Waterbury.

This witness, the driver of the truck, claimed to have seen petitioner's face for only a second or two (Rec., 434), in the dark, while the witness was lying, face down, on the floor of the interior of the truck (Rec., 423), with petitioner on his back tying the witness' hands *or* feet (Rec., 216; 426; 444-6), by turning his head to the left, on which side the witness' sight was seriously impaired (Rec., 435), he having less than 25% vision in the left eye (Rec., 286). Within several hours after the commission of the crime, the witness made a statement to the Chief of Police and the District Attorney, at complete and unreconcilable variance with his testimony upon the trial (Rec., 2934, petitioner Wissner's Exhibit A).

Whether the evidence, apart from the confession and the prior and subsequent oral statements, was sufficient to justify the verdict of guilty is of no moment. They (the confession and statements) were introduced over petitioner's objection; if by their admission petitioner was deprived of his constitutional right to due process under the Fourteenth Amendment to the Constitution, the error requires reversal.

> *Bram* v. *United States*, 168 U. S. 532, 533, 540-42;
> *Stromberg* v. *California*, 283 U. S. 359, 367, 368;
> *Lyons* v. *Oklahoma*, 322 U. S. 596, 597;
> *Malinski* v. *New York*, 324 U. S. 401, 404;
> *Haley* v. *Ohio*, 332 U. S. 596, 599, 606;
> *Turner* v. *Pennsylvania*, 338 U. S. 62;
> *Harris* v. *South Carolina*, 338 U. S. 68.

Such being the established rule of this Court, no attempt will be made to analyze the evidence, except as it applied to the manner in which the statements were obtained; if they, *or any of them*, were improperly admitted

and a constitutional right denied, this Court will not attempt to evaluate their effect (*Malinski* v. *New York*, *supra*, at p. 404; *Gallegos* v. *Nebraska*, 342 U. S. 55, 63; *Stroble* v. *California*, 343 U. S.).

In the *Stroble* case, decided by this Court April 7, 1952, Mr. Justice DOUGLAS, in a dissenting opinion which, in this respect, was not in conflict with the holding of the majority, stated, at p. :

> "The fact that the later confessions may have been lawfully obtained or used is immaterial. For once an illegal confession infects the trial, the verdict of guilty must be set aside no matter how free of taint the other evidence may be. *Malinski* v. *New York*, 324 U. S. 401, 89 L ed 1029, 65 S Ct 781."

Circumstances Under Which Confession and Oral Statements Obtained

Though the petitioners Cooper and Wissner are applying for writs of certiorari herein by filing their respective petitions and briefs separate from those of petitioner, we feel that only by considering the three together, each in the light of the other, can the members of this Court have a true understanding of the composite, total picture of wanton and deliberate violation of the constitutional rights of these petitioners. The physical condition *of all three petitioners* almost immediately upon their release from the custody of the State Police; the unmistakable evidence of physical beatings *in all three cases;* the shocking measures regularly, and as a matter of admittedly routine procedure, resorted to by the State Police in the detention of persons not even suspected of having any connection with the commission of the crime under investigation; the mental coercion exerted upon petitioners

through holding members of their families as hostages, *i.e.* the holding of petitioner Cooper's 65 year old father, in handcuffs, for 59 hours (Rec., 1371); the heaping of indignities upon the relatives of suspects, *e.g.* fingerprinting and photographing (Rec., 2998-9; 2999A; 3002; 3004), and, in the case of petitioner Wissner's wife, obliging her to sleep on a bare mattress, on the floor of the Barracks (Rec., 1656); the extortion of a general release as the price of freedom (Rec., 2252-3; 2255; 2960, petitioner Wissner's Exhibit S); the inexcusable delay in arraigning these petitioners* (Rec. 2008; 2019; 2043)—all point, unerringly, to an atmosphere which was "inherently coercive", an ugly spectacle which is a reproach to our American way of life, with its traditional sanctity of the rights and dignities of free men.

The undisputed facts appearing in the record constitute a searing indictment of the oppressive methods regularly and systematically employed by the New York State Police.

The Arrest.

At 2 A.M. on June 6, 1950 petitioner was arrested, without warrant, at the home of his brother, Lou Stein, with whom he was residing on East 3rd Street, in Manhattan, New York City, by Detectives Mulligan and Whelan of the New York City Police, accompanied by several officers of the New York State Police (Rec., 1958-60).

Before being taken from the home of his brother, petitioner requested that John Duff, an attorney with an office in New York City, be notified (Rec., 1687; 1960). Detective Mulligan, the senior officer and spokesman for the arresting group, testified that he knew of Mr. Duff, and

* Vide Appendices C and D (Sections 165 Code of Criminal Procedure and 1844 Penal Law of New York State, governing arraignments).

knew that he was an attorney, though he did not know him personally* (Rec., 1962).

Trooper Crowley, one of the arresting officers, testified that petitioner "wanted to get hold of" Duff (Rec., 1687). He noticed nothing abnormal about petitioner's arms while petitioner, in his underwear, was washing up (Rec., 1986-7).

Outside the apartment petitioner was handcuffed, placed in an automobile, driven to 14th Street and First Avenue, New York City, where he was transferred to another car without State Police insignia (Rec., 1699), belonging to one of the State Troopers, and driven to the Barracks of the State Police, at Hawthorne, where he arrived at approximately 3 A.M. that day (Rec., 1689).

Detective Mulligan, although he admitted "the law says we must book him" (Rec., 1963), did not book petitioner at any station house in New York City, but, instead, turned petitioner over, at the point of transfer, to the State Troopers (Rec., 1688, 1963).

The Detention and Interrogation.

The Barracks of Troop K of the New York State Police, at Hawthorne, are located in a secluded, rural section of Westchester County. The buildings are completely isolated, with no surrounding buildings, and no possibility of outcry being heard, or occurrences therein being witnessed by any outsider (Rec., 1340). The nearest building, a school house, is distant "1000 feet or more" from the Barracks (Rec., 1340).

For 68 hours petitioner was illegally detained, almost continuously in handcuffs, and, except for repeated ques-

* The first person petitioner asked to be notified, and saw, the day after his release from the custody of the State Police, was this same attorney, John Duff (Rec., 1836, 1846).

tioning, held incommunicado in these Barracks, "under the exclusive control of the police, subject to their mercy and beyond the reach of counsel or of friends" (Mr. Justice DOUGLAS, in *U. S.* v. *Carignan*, 342 U. S. 36, 39), before being arraigned before a Magistrate *at ten o'clock at night* on June 8, 1950,* during which period of illegal detention a written confession, as well as certain prior and subsequent oral statements, was obtained.

Isolated as are the Barracks, the section thereof in which petitioner was lodged, and where most of the questioning took place (the locker room, Day Room and "B. of I." office, located in the basement of the main building, Rec., 1905), is equally free of hindrance or supervision from outside sources. There are no detention cells (Rec., 1369); no sleeping quarters are provided for prisoners or suspects (Rec., 1369; 1929), and a prisoner must rely upon the generosity of the police for his food (Rec., 1907, 2010).

Captain Glasheen, in command of the Barracks, did not know the precise time when petitioner was taken to the locker room, but conceded that it could have been "after his fingerprints were taken early in the morning of June 6" (Rec., 1922). He there questioned petitioner from 10 A. M. to 11 A. M. on June 6, with an armed guard present (Rec., 1906), at which time petitioner denied any connection with the Reader's Digest crime (Rec., 1906).

Shortly after 1 P. M., on June 6, the questioning was resumed by Glasheen, in the locker room, at which time Sergeant Johnson was present, as were other officers and armed guards (Rec., 1907; 1925). This particular session

* It is worthy of note that petitioners were arraigned on the evening of the day on which a writ of habeas corpus, obtained by Duff on behalf of petitioner Stein, in the county where the latter was arrested (New York), was returnable (Rec., 2966-2969, petitioner Stein's Exhibits EE, FF and GG).

lasted until 4 or 4:30 P. M., with petitioner still protesting his innocence.

That same day, "around 6:30 that evening" (Rec., 1926), the ordeal of questioning was once again resumed, in the locker room, this time for a more protracted period, lasting until 2:15 or 2:30 in the morning of June 7, during all of which time petitioner, then 52 years of age, was kept awake* and in handcuffs (Rec., 1926). The questioning was again conducted by Glasheen, "with other troopers and officers". On this occasion, between 2:15 and 2:30 A. M., Glasheen "read two questions and answers" from Cooper's confession to petitioner (Rec., 1939; 1954), who still proclaimed his innocence.

Considering the source, the estimate as to the number of hours spent in interrogation of petitioner is certainly not exaggerated. Throughout this entire period of intensive questioning, badgered and beleaguered at will, without the aid of counsel whose assistance he had sought from the moment of his arrest, and without the solace of relatives or friends, petitioner maintained his innocence.

Finally, at about 10 A. M. on June 7, the contest of endurance and attrition came, inevitably, to an end. In response to a message from Johnson, who had been with petitioner, Glasheen returned to the locker room; at that time, supposedly, petitioner, in the presence of Glasheen and Johnson, made an oral statement implicating himself. Its details were not put in evidence (Rec., 1908-9).

How long Johnson had been with petitioner does not appear in the record. Upon the preliminary examination

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*"It has been known since 1500 at least that deprivation of sleep is the most effective torture and certain to produce any confession desired." Report of Committee on Lawless Enforcement of Law, made to the Section of Criminal Law and Criminology of the American Bar Association (1930), 1 American Journal of Police Science 575, 579-80, also quoted in IV Wickersham Report on Law Observance and Enforcement, p. 47.

as to the voluntariness of the confession, Johnson was not called as a witness by the People, nor was any other Trooper, to account for the 16 of the first 32 hours of petitioner's illegal detention which remained unaccounted for after Glasheen's testimony.

Although the first oral statement by petitioner was supposedly made some time between 10 A. M. and 11 A. M. on June 7, the written confession, made in the "B. of I." office (Rec., 1911), was not signed until 4:30 that afternoon (Rec., 1914). The stenographer, a former employee of the Reader's Digest Association (Rec., 1659), testified that the questioning was conducted by Glasheen, with Sergeants Johnson and Sayers present, as was Detective Whelan of the New York City police during part of the questioning. She testified that there were discussions between the group which she did not take down (Rec., 1614-21), and that after the questioning she saw petitioner sitting with his eyes closed (Rec., 1653). Glasheen testified that after the confession was signed, petitioner was given a tray of food (Rec., 1915).

There were subsequent oral statements testified to by the police. Detective Mulligan testified that at 11 P. M. on June 7, in a conversation with petitioner, had in the presence of Sergeant Sayers "and other troopers", petitioner referred to Cooper's "putting him into the seat" (Rec., 2238-9).

Glasheen testified that on June 8, "shortly before noon", petitioner described to him the clothing he wore on the occasion of the robbery, and, at Glasheen's suggestion, gave Sergeant Manopoli a note to petitioner's brother, directing the latter to turn the clothing over to the bearer of the note (Rec., 1989; 1991). Neither the note nor any of the articles of clothing were offered in evidence.

Trooper Crowley testified that, on the afternoon of June 8, petitioner accompanied the witness and Glasheen to the premises of the Reader's Digest, where petitioner pointed out to them various locations (Rec., 1704-5).

On June 8, at about 6:15 P. M., in the presence of the District Attorney, Glasheen, Johnson and "armed guards", petitioner supposedly "identified" the witness Waterbury as the "driver of the truck" (Rec., 240-1; 2917, Respondent's Exhibit 75).

After the arraignment on June 8, *while still in the custody of the State Police,* petitioner supposedly made a further statement to Glasheen, in the presence of other troopers, which statement was in the nature of a clarification as to the use of the truck employed in the robbery (Rec., 1996).

Counsel's Search.

It is undisputed that, at the time of his arrest, petitioner requested that John Duff, the attorney, be notified (Rec., 1687; 1960). Lou Stein, petitioner's brother, complied by phoning the attorney at the latter's home at 7:20 A. M. June 6, 1950 (Rec., 1828).

Duff testified to the efforts he made to locate petitioner, efforts which were unavailing because of the fact that petitioner was taken into custody by Detectives Mulligan and Whelan *of the New York City police,* accompanied by other officers dressed in civilian clothes, whose identities were then unknown, and that he (the witness) "had every reason to believe that he [petitioner] was in the custody of the New York City police, because he had been arrested by a New York City detective, Mulligan" (Rec., 1850).

Though there was some question whether petitioner's brother was advised of petitioner's destination, we submit

that the undisputed proof in the record establishes, without substantial challenge, that he was not, as witness the fact that Dorfman and Wissner had not, at the time, been apprehended (Rec., 2019). The aura of secrecy which attended petitioner's arrest, detention, inquisition and confession, which was not dissipated until his arraignment, 68 hours after his arrest, is consistent with failure of disclosure.

In addition to inquiring at various station houses in New York City, at Police Headquarters in New York City, at the Felony Court in the Borough of Manhattan of the City of New York, at the office of the then Police Commissioner of New York City, William O'Brien, Duff sought to communicate personally with Detective Mulligan, and left his phone number at the latter's office, with the request that the detective phone him "as soon as possible" (Rec., 1829), to which request, made on the day of petitioner's arrest, he received no response.

Finally, on June 8, 1950, Duff sued out a writ of habeas corpus in New York County (Rec., 2968, petitioner's Exhibit FF for identification). At ten o'clock that night all three petitioners were arraigned before a Magistrate, after, in the case of petitioner, 68 hours of illegal detention; in the case of petitioner Cooper, 86 hours of illegal detention, and, in the case of petitioner Wissner, the non-confessing defendant, 38 hours of illegal detention.

It was established that the judge before whom petitioners were arraigned had been available, during the period of petitioners' detention, "24 hours a day", "at any time or any hour, around the clock" (Rec., 1270).

The Injuries.

Shortly before midnight on Thursday, June 8, the State Police lodged the three petitioners in the County Jail (Rec., 1273; 1858; 2517-8). Apart from the short period of time consumed in arraigning them before the Magistrate, they had been held incommunicado, separate and apart from each other, from the times of their respective arrests.

Early on the morning of June 9 the jail physician, Dr. Vosburgh, examined the three petitioners, each of whom was brought to the doctor's clinic *alone*, from distantly separated parts of the jail. No other prisoner was present when the doctor examined each one individually (Rec., 1860-1).

On petitioner Wissner, the first to be examined, he observed bruises on the left side of the chest. The fifth rib on the left side was broken, according to Dr. Vosburgh's record of June 9; the sixth rib on the left side was also broken, as disclosed by the X-ray report of June 12. There were abrasions of both shins, bruised areas on the thighs, the left side of the abdomen and the buttocks, and a bump on the head (Rec., 2954, Exhibit R; 3011-2, Exhibit PPP, petitioner Wissner's medical records).

On petitioner Stein, next to be examined, the doctor's report showed multiple bruises "in the left upper arm, between the elbow and the shoulder" (Rec., 1713; 2909-10, Respondent's Exhibit 65, Stein's medical record). The witness Duff examined petitioner Stein the same day, at about 3 P.M. (Rec., 1838), and made a record, in shorthand, of his observations, which record was produced upon the trial (Rec., 1840, Stein's Exhibit HH for identification). He observed that "there were bruises on the left arm, his right arm and the left lower ribs below the breast" (Rec., 1839). Duff observed and made note of the dimensions of the bruises, as follows: "The left arm, area of

discoloration and bruises, approximately 7 inches long and 4 inches wide. Right arm, above the elbow, discoloration and bruises about 3 inches long and 1 inch wide. Left lower chest, second, third and fourth ribs, from the floating ribs to the left and below left breast, black and blue marks in area approximately 3 by 4 inches" (Rec., 1840).

On petitioner Cooper, the last of the three petitioners to be examined by Dr. Vosburgh on the morning of June 9, the latter found "bruises on the left posterior lateral chest, abdomen, in the right bicep area, and on both buttocks" (Rec., 1237-9; 2971, Exhibit BBB, petitioner Cooper's medical record).

Thomas J. Todarelli, a member of the New York Bar, testified to extensive injuries which he and two other attorneys observed and measured on the person of petitioner Cooper on June 10, 1950 (Rec., 1260-2). His description supplements that of the jail physician, just as Duff's observations and notations supplement the doctor's record of petitioner Stein's injuries.

A week later Duff again examined petitioner Stein, and observed that "The bruise marks on the left arm were faintly discernable (sic), those on the left arm were not as pronounced as on the first occasion when I observed them on June 9, but they were still clearly noticeable. The bruises in and about the ribs were still clearly noticeable" (Rec., 1841).

The prosecution did not question this witness concerning the injuries which he described, and, in fact, conceded that he would not commit perjury (Rec., 1845). On summation the District Attorney frankly stated that he did not question the witness' observations, but sought to account for the injuries described by him on the theory of self-infliction (Rec., 2707-8).

The Complaint.

On June 16, 1950 petitioner personally entered a plea of Not Guilty to the original indictment*, and requested that counsel be assigned to represent him (Rec., 1848-9). Though Duff was present in Court on that occasion, he emphasized that he was there "to note" his "withdrawal from the case" (Rec., 1848), although it is undisputed that, despite the witness' use of the word "withdrawal", he had never appeared in Court on behalf of petitioner.

No assignment of counsel was made until July 24, 1950 (Rec., 14; 15), after which assignment complaint was made, on August 14, 1950, in the form of a proceeding brought under Article 78 Civil Practice Act (New York) to suppress the confession, which proceeding was brought in the Supreme Court of Westchester County (Rec., 1842).

The People's Explanation for the Injuries.

In an endeavor to account for the undisputed proof of physical injury to all three petitioners, the prosecution advanced the theory of self-infliction. In the case of petitioner Stein, the theory was advanced, *for the first time*, in the course of the prosecutor's closing remarks to the jury, when he stated: "I am not saying that Mr. Duff is not telling the truth; but Dr. Vosburgh said that those injuries could have been self-inflicted" (Rec., 2707-8).

Actually, Dr. Vosburgh never testified that, as to petitioner Stein, the injuries could have been self-inflicted.

The other half of the dual apologia for the injuries sustained by petitioner was the contention, founded upon the answer to a hypothetical question put to Dr. Vosburgh, not based upon any evidence in the case, that the injuries which petitioner sustained could have been inflicted by the

* A superseding indictment was filed on June 30, 1950 (Rec., 8).

"grasp" of a "strong, healthy officer with a strong grip" (Rec., 1740).

Thus did the prosecution seek to sustain the *burden of proof* imposed upon it by law of explaining the manner in which the injuries were sustained (*People* v. *Barbato*, 254 N. Y. 170, 176; *People* v. *Valletutti*, 297 N. Y. 226, 230).

Grounds Upon Which the Jurisdiction of This Court is Invoked

It is respectfully submitted that this Court has jurisdition of this petition for certiorari under Section 1257 (3) of the United States Code (as amended by the Act of June 25, 1948), such petition being one to review the final judgment of the Court of Appeals of the State of New York in which a decision could be had, rendered March 6, 1952.

The judgment affirmed a judgment sentencing petitioner to death (Rec., 2801-2); and in said Court of Appeals petitioner especially set up and claimed, under the Fourteenth Article of Amendment of the Constitution of the United States, the right, privilege and immunity against being deprived by the State of New York of his rights, life and liberty without due process of law, and, as certified by said Court of Appeals, this point was "presented and necessarily passed upon by this Court" (Order Amending Remittitur, dated April 18, 1952), the point having been specifically presented in the brief and reply brief on behalf of petitioner, on the argument of the appeal from the judgment of conviction and death of the County Court of Westchester County, New York State, and specifically on the trial (See page references contained in footnote ***, page 2 *supra*).

Reasons Relied Upon for the Allowance of the Writ

The Court of Appeals of the State of New York has decided a federal question of substance in a way probably not in accord with the applicable decisions of this Court, in that the Court of Appeals of the State of New York has affirmed a judgment and sentence of death wherein the "total situation" out of which the confession and prior and subsequent oral statements of petitioner came, "and which stamped their character", *was and could only have been* one of coercion, whereby petitioner was deprived of his rights, life and liberty without due process of law.

See:

White v. *Texas*, 309 U. S. 631;
Ashcraft v. *Tennessee*, 322 U. S. 143;
Lyons v. *Oklahoma*, 322 U. S. 596;
Malinski v. *New York*, 324 U. S. 401;
Haley v. *Ohio*, 332 U. S. 596;
Watts v. *Indiana*, 338 U. S. 49;
Turner v. *Pennsylvania*, 338 U. S. 62;
Harris v. *South Carolina*, 338 U. S. 68;
Gallegos v. *Nebraska*, 342 U. S. 55;
United States v. *Carignan*, 342 U. S. 36;
Stroble v. *California*, 343 U. S.

WHEREFORE, your petitioner, Harry A. Stein, prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the Court of Appeals of the State of New York, commanding the said Court to certify and send to this Court, for review and determination, as provided by law, this cause and a complete transcript of the record and all proceedings had therein; and that the order of the Court of Appeals of the State of New York affirming the judgment in this cause may be reversed, and

that the petitioner, Harry A. Stein, may have such other and further relief in the premises as this Court may deem proper.

Dated, May 26, 1952.

HARRY A. STEIN,
Petitioner.

PHILIP J. O'BRIEN,
JOHN J. DUFF,
Counsel for Petitioner.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari, and that, in my opinion, it is well founded and the cause is one in which the petition should be granted.

PHILIP J. O'BRIEN,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1951

No.

HARRY A. STEIN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The Court of Appeals of the State of New York, in affirming the judgment of conviction herein, rendered no opinion (see Weekly Advance Sheets No. 675, April 5, 1952, 303 N. Y. 856).

Statement of Jurisdiction, Question Presented and Facts

The statement under which the jurisdiction of this Court is invoked, as well as the statement of the question presented, and the factual matter relevant to this application appear in the petition to which this brief is annexed.

Argument

Petitioner urges that he has been convicted of the crime of murder, and sentenced to death as the result of a trial in which there were received in evidence against him, over his objection, a confession, as well as certain prior and subsequent oral statements, obtained after prolonged interrogation, which confession and oral statements were the result of police violence or coercion, or both, and the continuing fear and effect thereof, while petitioner was being illegally detained, incommunicado, all in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

POINT I

The admission in evidence of petitioner's confession and prior and subsequent oral statements was a violation of the rights of petitioner under the due process clause of the Fourteenth Amendment of the Constitution of the United States.

The question here involved is whether the confession of petitioner, made on June 7, 1950, as well as a prior oral statement made the same day, and certain subsequent oral statements made that day and the following day, all received in evidence over his objection and exception, were made under such circumstances as to render them, *or any of them*, inadmissible under the applicable decisions of this Court and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Petitioner did not testify upon the preliminary examination as to the voluntariness of the confession and oral statements. As we have pointed out in the petition, however (page 15, *ante*), petitioner, after counsel had been

assigned to represent him, brought a proceeding in the New York Supreme Court, under Article 78 of the New York Civil Practice Act, to suppress his confession upon the ground that the same had been obtained during a period of illegal detention, after prolonged questioning, and through police violence and coercion, all in violation of his constitutional rights. Petitioner's supporting affidavit sets forth in great detail the acts complained of*. The proceeding was dismissed, upon the ground that "Whether the confession was voluntary or not can be tried at the trial by the jury. Their determination will indicate whether the grave charges made against the police are true, and that determination will indicate the course then to be pursued"**.

No other method is provided in New York State whereby a defendant who claims that his confession was an involuntary one can himself give sworn proof of what took place in the confession chambers, without being compelled to testify, and thus subject himself to questioning on the principal crime charged in the indictment, before the very jury which is trying the ultimate question of his guilt or innocence.

The procedural risks which beset a defendant who would be heard on the question of the voluntariness of his confession are a deterring consideration. There is no

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* It recites that at the time of arrest Detective Mulligan and Trooper Crowley promised to notify petitioner's lawyer, Duff; that after arrival at the Hawthorne Barracks, and until he confessed, petitioner was repeatedly punched and kicked by different Troopers; that he was compelled to remain awake; that he was refused food; that he asked for his lawyer on numerous occasions, and each time was kicked and told that he could not see him, that he was police property, and that if he continued to "holler" for his lawyer the Troopers would kill him. He was told that his sweetheart was being detained, and that she would be released only when he had confessed.

** Order of Mr. Justice Schmidt, Justice of the New York Supreme Court, Westchester County, which appeared in the New York Law Journal of September 15, 1950.

provision for trying the issue out of the hearing of the jury, as is the case in the federal courts, as well as in many state jurisdictions. Under the procedure in New York State a defendant who would contest the validity of his confession is confronted with a dilemmatic choice which is at conflict with the spirit of the privilege against self-incrimination.

In any event, we respectfully submit that the fact that petitioner did not testify is a circumstance of no significance, in view of the undisputed proof in the record both as to petitioner's physical condition at the time of his arrest (Rec., 1986-7) and, as recorded by the jail physician and a member of the New York Bar, his condition almost immediately after his release from the custody of the State Police (page 13, *ante*), and in view, also, of the injuries to petitioners Cooper and Wissner (pages 13, 14, *ante*). This uncontroverted proof, of itself, speaks more eloquently of police violence than any testimony which petitioner might have given.

We feel that the independent examination which this Court has stated it is its duty to make (*Haley* v. *Ohio*, *supra*, 599) will demonstrate conclusively, from the undisputed evidence, that force or coercion, or both, were used to exact the confession and prior and subsequent oral statements of petitioner. In the face of the bruises appearing on the body of petitioner on the morning of June 9, bruises which were not present at the time of his arrest on June 6, how can it possibly be said that petitioner was not beaten during the period of his illegal detention in the Hawthorne Barracks?

Putting to one side the controverted evidence, and taking only the undisputed testimony, we have the following sequence of events. At 2 A.M. on June 6, 1950 petitioner was arrested at the home of his brother (Rec.,

1958). Before being taken from the apartment, he washed up, while clad in his underwear (Rec., 1986). At that time Trooper Crowley observed nothing abnormal about petitioner's exposed arms (Rec., 1987). From that moment he was continuously in the custody of the State Police until about midnight June 8, when he was lodged by them in the County Jail (Rec., 1273). Early the next morning he was examined by the jail physician, that afternoon by a lawyer for whom he had sent. Both these witnesses were in agreement as to the multiple bruises found in the area of the left arm of petitioner, between the elbow and the shoulder (page 13, *ante*). The attorney's examination, a more thorough one, we submit, disclosed numerous other bruises on various parts of petitioner's body (Rec., 1840-1).

If this undisputed evidence, this panorama of events does not at least "*suggest* that force or coercion was used to exact the confession" (*Haley* v. *Ohio*, *supra*, 599; italics ours), then we respectfully submit that the term has lost its meaning.

Any remaining doubt as to the measures visited upon petitioner by the State Police is dispelled, beyond possibility of refutation, by the undisputed fact of the injuries appearing on the bodies *of all three petitioners* almost immediately after their release from the custody of the State Police. This proof of physical injury, so tellingly portrayed even by the admittedly incomplete recorded entries of a county official who was definitely a hostile witness, leads to but one inevitable conclusion, *e.g.* that the confession of petitioner was "coercion's product", as was the confession of petitioner Cooper, their failure to testify notwithstanding.

It is inconceivable that this Court would hold that unless a defendant testifies it is futile to introduce proof of

police violence of the character introduced in the case at bar.

The duty of the prosecution "satisfactorily to account" (*People* v. *Valletutti, supra*, 230) for these injuries was not conditional upon the petitioners having first testified. In token acknowledgment of the rule, the prosecution did undertake to explain the manner in which the injuries were sustained, albeit in a manner which hardly merits serious consideration, *e.g.* on the theory of self-infliction.

As for the explanation offered, we point to one undisputed fact which disposes, with devastating finality, of the prosecution's whole specious attempt to account for the injuries received by the confessing petitioners, Cooper and Stein. Wissner, *the non-confessing petitioner*, bore the most aggravated injuries, among them two fractured ribs. He had no confession to explain away, and yet the prosecution argued before the jury and the appellate Court below that he inflicted these injuries upon himself, while Cooper and Stein, in distantly separated parts of the County Jail, were performing similar rites of self-flagellation. The utter absurdity of the theory is rendered self-evident by the nature of the injuries, injuries which appeared all over the petitioners' bodies, even on such portions of the body as the buttocks (Rec., 3012; 2971).

Upon the hypothesis advanced by the prosecution, one would have to be so credulous as to believe that petitioner Wissner, with no confession to "self-inflict away", immediately after arraignment deliberately set about to and did break his own ribs, abrade his shins, and bruise his thighs, abdomen, head and buttocks, while alone in a prison cell. The mere statement of the theory of self-infliction in this case is enough to demonstrate its shallowness and unreality.

It is only fair to add, in connection with the injuries sustained by petitioner, that both Captain Glasheen and Sergeant Barber testified that not a hand was laid on him (Rec., 1914; 1931-2; 1149; 2083), but it is also true that charges of police brutality, even where supported, as in the case of petitioners, by incontrovertible proof, inevitably evoke denials by the police, denials which have become a shopworn stereotype.

> "As is usual in this type of case the deputies say that the confession was wholly 'voluntary'; * * *." (Mr. Justice BLACK, dissenting, in *Gallegos v. Nebraska*, 342 U. S. 55, 74).

It would be the height of naivete to expect these officers to admit under oath to the commission by them of a serious crime. Certainly the members of this Court are not, like so many cloistered academics, so removed from everyday reality as to expect petitioner to prove acts of police brutality *out of the mouths of the very perpetrators of such acts.* In the light of the undisputed proof of physical injury to all three petitioners, their denials are meaningless.

Despite the finding of the jury and the appellate Court below, resolving against petitioner the question of force or coercion in connection with the manner in which his confession and prior and subsequent oral statements were obtained, we submit that this Court is not bound thereby, but is, rather, under the solemn duty of making an independent investigation to determine the facts for itself.

It is, of course, petitioner's contention here, as it was upon the trial and upon appeal to the Court below, that the confession and prior and subsequent oral statements of petitioner should have been ruled invalid by the trial Court, *as a matter of law*, and the matter of their voluntariness not submitted to the jury as a question of fact.

Even as a question of fact, however, the matter of their voluntariness was never submitted to the jury "under proper instructions" (*Gallegos* v. *Nebraska, supra*, 58). Not a single reference was made by the Court, in its charge, to the testimony of any of the four witnessess called by petitioner upon the preliminary examination.

In *Ward* v. *Texas*, 316 U. S. 547, 550, the Court said:

> "Each State has the right to prescribe the tests governing the admissibility of a confession. In various States there may be various tests. But when, as in this case, the question is properly raised as to whether a defendant has been denied due process of law guaranteed by the Federal Constitution, we cannot be precluded by the verdict of a jury from determining whether the circumstances under which the confession was made were such that its admission amounts to a denial of due process."

In *Ashcraft* v. *Tennessee, supra*, 145, speaking of the duty of the Supreme Court to make an independent examination to determine whether a confession was voluntary, the Court said:

> "Our duty to make that examination could not have been foreclosed by the finding of a court, or the verdict of a jury or both."

In *Lisenba* v. *California*, 314 U. S. 219, 240, it is said:

> "* * * we think it right to add that when a prisoner held incommunicado is subjected to questioning by officers for long periods and deprived of the advice of counsel, we shall scrutinize the record with care to determine whether, by use of his confession, he is deprived of his liberty or life through tyrannical or oppressive means".

In the instant case every device condemned by this Court as obnoxious to the Constitution was employed to

obtain petitioner's confession. Summarized, they are: Failure to book petitioner in any station house; spiriting him away, in the dead of night, to an undisclosed destination, where counsel could not reach him; failure to advise counsel whose assistance petitioner had sought, amounting to a denial of the right of counsel; repeated questioning, day and night, with lack of sleep, if not of food; holding incommunicado from 2 A.M. June 6 to 10 P.M. June 8; the beating of petitioner, as evidenced by petitioner's physical condition on the morning of June 9. In addition, we have the complete lack of any explanation, on the part of the prosecution, for the injuries found on the bodies of all three petitioners, other than fantastic conjecture which taxes the credulity of any but the most gullible. What more could be done, or must be done, we respectfully ask, to establish that a confession is involuntary?

The Inexcusable Delay in Arraignment.

It was conceded that the arraignment of all three petitioners was wilfully and wrongfully delayed in violation of the statutes (Section 165 Code of Criminal Procedure of New York State; Section 1844 Penal Law). The trial Court eventually so determined as a matter of law, as an afterthought at the end of its charge, although in the body of the charge the Court had first erroneously left it as a question of fact for the jury.

Section 165 of the New York Code of Criminal Procedure, requiring a defendant to be taken before a magistrate without unnecessary delay, and Section 1844 of the Penal Law, making the failure of the arresting officer so to do a misdemeanor, are set forth in Appendices C and D.

Although no time is stated either in Section 165 of the Code of Criminal Procedure or Section 1844 of the Penal

Law, it is nevertheless implicit in such statutes that the arresting officer must act promptly and without unnecessary delay (*McNabb* v. *United States*, *infra*).

A somewhat similar statute governs federal procedure*.

There may be situations where delay is unavoidable, i. e. inability to locate a magistrate, or illness of the prisoner. As heretofore pointed out in the petition (page 12, *ante*), a magistrate was available during every hour of the 68 hours of illegal detention (Rec., 1270).

Were this a case arising in the federal courts there could be no doubt that the confession and prior and subsequent oral statements of petitioner could not stand against the rule of *McNabb* v. *United States*, 318 U. S. 322, which forbids inexcusable detention for the purpose of extracting evidence from an accused, irrespective of actual coercion, and condemns "easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection" (page 344). Yet, since *McNabb*, in cases arising from state courts under the Fourteenth Amendment, *Ashcraft* v. *Tennessee*, *supra*, and *Malinski* v. *New York*, *supra***, this Court has set aside convictions obtained by the use of confessions extracted after prolonged detention, coupled with intensive interrogation.

It is true that in *Malinski* there was the additional element of coercion in the form of threats of violence. Though the petitioner there claimed that there was, in fact, actual violence, this Court attached no weight to the claim:

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* Vide Appendix F (Federal Rules of Criminal Procedure: Rule 5).

** In *Ashcraft* the accused was detained by the police for 36 hours before being granted a preliminary hearing. In *Malinski* a confession obtained after ten hours detention was ruled invalid.

> "He said he was beaten; but that was disputed. And the assertion has such a dubious claim to veracity that we lay it aside" (page 403).

Also, at page 403:

> "There was no visible sign of any beating such as bruises or scars".

In both cases there was proof of illegal detention, plus the usual concomitant of continuous questioning, and, in the case of *Malinski*, the added element of admitted threats, *but without proof of physical mistreatment*, i.e. bruises appearing on the petitioners' bodies.

While the record in *Turner* v. *Pennsylvania, supra*, discloses that petitioner there made some claim of being hit with a chair, and in *Harris* v. *South Carolina, supra*, petitioner claimed to have been slapped by an officer, in neither case did this Court, in setting aside convictions based upon confessions obtained after prolonged detention and intensive questioning, refer to such claims or in any way base its decision thereon.

Even apart from the elements of physical injury and continuous interrogation, both here present, there is certainly considerable support for the belief that the right to a prompt preliminary hearing is such an "impressively pervasive requirement of criminal procedure" (*McNabb* v. *United States, supra*, 343) that it must be considered among "the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land'" (*Herbert* v. *Louisiana*, 272 U. S. 312, 316).

Even if such a conclusion would seem to extend the implications of this Court's decisions and "the effect of a mere denial of a prompt examining trial is a matter of state, not of federal law" (*Lyons* v. *Oklahoma, supra*, 597

n. 2), still it is clear that the fact of prolonged detention will be considered as affecting the voluntary nature of a confession (*Lyons* v. *Oklahoma, supra; Haley* v. *Ohio, supra*).

In the case at bar, at any rate, we have not only those determining factors which were present in *Watts* v. *Indiana, supra; Ashcraft* v. *Tennessee, supra, Turner* v. *Pennsylvania, supra,* and *Harris* v. *South Carolina, supra,* e.g. the many hours of intensive interrogation, plus the illegal detention, but, *in addition,* that which was not present in any of the cases cited—*undisputed and indisputable proof of injuries sustained by all three petitioners.* This one factor, absent from *Ashcraft* and its companions, demands their application on an *a fortiori* basis.

Mr. Justice JACKSON, in concurring in the result in the *Watts* case, *supra,* stated (pages 59-60):

> "Of course, no confession that has been obtained by any form of physical violence to the person is reliable and hence no conviction should rest upon one obtained in that manner. Such treatment not only breaks the will to conceal or lie, but may even break the will to stand by the truth. Nor is it questioned that the same result can sometimes be achieved by threats, promises, or inducements, which torture the mind but put no scar on the body".

In dissent, in *Ashcraft* v. *Tennessee, supra,* the same Justice said (page 160):

> "Interrogation per se is not, *while violence per se is, an outlaw*". (Italics ours).

We are not unmindful that the mere fact that a confession was made while in the custody of the police does not render it inadmissible (*McNabb* v. *United States, supra,* 346). It is, however, a circumstance to be considered, as

is the fact of an extended delay in arraignment, the holding of a prisoner incommunicado without opportunity to see counsel or friends (*Ward* v. *Texas, supra; Malinski* v. *New York, supra*), and subjecting him to long and gruelling questioning (*Ward* v. *Texas, supra; Watts* v. *Indiana, supra*). All of these elements are here present, with the additional undisputed one of physical injuries.

Petitioner's Subsequent Oral Statements.

Subsequent to the written confession, there were supposedly five oral statements or incriminating acts of petitioner (pages 10, 11, *ante*). These statements and acts, we submit, are entitled to no greater consideration than the written confession or the prior oral statement, for they suffered from the same infirmities which rendered the others invalid.

Petitioner, at the time of these subsequent statements and acts, was still in the custody of the State Police; he was still without the aid of counsel whom he had sought from the moment of his arrest; he was still without the solace of relatives or friends, and was still suffering from injuries already inflicted by the State Police.

The principle we here invoke is that stated by this Court in *Malinski* v. *New York, supra,* 428:

> "A man once broken in will does not readily, if ever, recover from the breaking".

Also, at pages 425-6:

> "No one else except his imprisoners was allowed to see him at any time."

Also, at page 429:

> "* * * a series of confessions, of which the first is the creative precursor of the later ones".

Even if the later statements or acts were lawfully obtained, the prior confession or statement having once "infected the trial, the verdict of guilty must be set aside no matter how free of taint the other evidence may be" (*Stroble* v. *California, supra; Malinski* v. *New York, supra,* 433).

Controlling Decisions.

Decisions which support petitioner's contentions and justify the granting of the writ sought are:

Ashcraft v. *Tennessee,* 322 U. S. 143;
Brown v. *Mississippi,* 297 U. S. 278;
Carignan v. *United States,* 342 U. S. 36;
Chambers v. *Florida,* 309 U. S. 227;
Gallegos v. *Nebraska,* 342 U. S. 55;
Haley v. *Ohio,* 332 U. S. 596;
Harris v. *South Carolina,* 338 U. S. 68;
Lisenba v. *California,* 314 U. S. 219;
Lyons v. *Oklahoma,* 322 U. S. 596;
Malinski v. *New York,* 324 U. S. 401;
McNabb v. *United States,* 318 U. S. 322;
Stroble v. *California,* 343 U. S. ;
Turner v. *Pennsylvania,* 338 U. S. 62;
Ward v. *Texas,* 316 U. S. 547;
Watts v. *Indiana,* 338 U. S. 49.

CONCLUSION

The conceded and proven facts in the instant case, hereinbefore specifically set forth, disclose a situation more flagrant and indefensible than was shown in any of the cases cited in this petition and brief. No novel rule is asserted by petitioner. His rights under the Constitution have been unlawfully invaded. He invokes its protecting ægis that his life may not be forfeit by the use of a confession and

prior and subsequent oral statements obtained under circumstances violative of the due process clause of the Fourteenth Amendment of the Constitution.

So conclusively apparent does the record disclose an invasion of petitioner's rights under the Fourteenth Amendment that the intervention by this Court, to prevent a gross miscarriage of justice and the execution of petitioner as a result of practices condemned by it, is imperative.

Petitioner's position upon this application is best stated in the language of this Court in *Chambers* v. *Florida*, *supra*, 240:

> "To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol".

We respectfully pray that the petition for certiorari be granted.

Respectfully submitted,

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[APPENDICES FOLLOW]

Appendix A

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix B

JUDICIAL CODE OF THE UNITED STATES, SECTION 1257 (c), AS AMENDED BY THE ACT OF JUNE 25, 1948.

It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this

paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

Appendix C

SECTION 165 OF THE Code of Criminal Procedure OF THE STATE OF NEW YORK.

The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night.

Appendix D

SECTION 1844 OF THE PENAL LAW OF THE STATE OF NEW YORK

A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor.

Appendix E

SECTION 399 OF THE CODE OF CRIMINAL PROCEDURE OF THE STATE OF NEW YORK

A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime.

Appendix F

Federal Rules of Criminal Procedure:

"Rule 5. Proceedings before the Commissioner.

"(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

"(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules."